

In its brief to the Board, respondent argues that the Judge erred by conducting the September 8, 2009, preliminary hearing and by considering Dr. Khan's medical report because that report was not attached to claimant's application for a preliminary hearing. Respondent maintains that failing to attach the medical report to the application violated both K.S.A. 44-534a(a)(1) and respondent's right to due process. Respondent also contends the Judge violated both K.S.A. 44-510h(b)(1) and respondent's right of procedural due process by designating Dr. Khan as the treating physician rather than permitting respondent to control claimant's medical treatment. In short, respondent requests the Board to vacate Judge Avery's Order appointing Dr. Khan as claimant's treating physician.

Conversely, claimant requests the Board to dismiss this appeal. Claimant argues the *Bergstrom*¹ decision requires the Board to strictly interpret K.S.A. 44-534a, which limits the findings that are subject to review from a preliminary hearing order. And since none of the issues being raised by respondent are listed in that statute as being subject to review from a preliminary hearing order, claimant argues the Board lacks jurisdiction to address them in this appeal. Claimant argues, in part:

[Nowhere] in the *[sic]* K.S.A. 44-534a where it discusses appeals does [it] say the Board can re-evaluate the ALJ's finding[s] on whether or not a hearing should take place (on a non-disputed claim) based upon an alleged procedural decency *[sic]* in the notice of intent, the admission of records or a determination as to whether respondent is providing or refusing to provide medical treatment.²

In addition, claimant contends the Judge had the authority to rule on respondent's procedural objections and, therefore, the Judge did not exceed his jurisdiction. Claimant asserts respondent's objection to Dr. Khan's medical report went to the admissibility of the document, which is not a jurisdictional issue subject to review at this time. Moreover, claimant argues respondent's due process arguments may not be reviewed by the Board as the Board does not have the authority to make constitutional rulings. In the alternative, claimant asserts respondent was not denied due process at the September 8, 2009, preliminary hearing as respondent knew the issue to be addressed at the preliminary hearing was pain management and respondent had even written a doctor for an opinion that would support its position at the hearing.³ Finally, claimant contends the Judge did not violate K.S.A. 44-510h, which deals with changing physicians, as respondent was not providing any medical treatment at the time of the hearing and, therefore, that statute is not applicable.

The following issues have been raised on this appeal:

1. Does the Board have jurisdiction to review whether the Judge either exceeded his jurisdiction or denied respondent due process by (a) conducting the September 8, 2009, preliminary hearing, (b) considering Dr. Khan's medical report, or (c) designating the treating physician?

¹ *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

² Claimant's Brief at 3 (filed Oct. 19, 2009).

³ It appears that on July 28, 2009, claimant's counsel faxed a demand and notice of intent to respondent's counsel regarding temporary total disability benefits and pain medicine management, which was filed with the Division of Workers Compensation on August 4, 2009.

2. If so, did the Judge exceed his jurisdiction by either conducting the September 8, 2009, preliminary hearing or considering Dr. Talal Khan's medical report when that report was not attached to claimant's application for preliminary hearing?
3. Did the Judge exceed his jurisdiction by designating Dr. Khan as the authorized treating physician rather than permitting respondent to provide claimant a list of three doctors from which to select a treating physician?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

Claimant alleges he was injured on November 10, 2008, while working for respondent. At the September 8, 2009, preliminary hearing, respondent indicated it was not challenging the compensability of this claim. Respondent did, however, dispute that claimant needed pain management services. Instead, respondent offered that claimant could return to Dr. Adrian P. Jackson, who earlier released claimant and indicated claimant might occasionally need anti-inflammatory medication.

Respondent had provided claimant with the medical services of Dr. Jackson. Claimant testified that Dr. Jackson released him from medical treatment in roughly February or March 2009.⁴ Claimant then went to his family physician to obtain his medication prescriptions.

The Workers Compensation Act requires an injured worker to advise the adverse party of the intent to seek a preliminary hearing. The Act requires the notice of intent to specify the benefit being sought that will be the subject of the preliminary hearing.⁵ Claimant's August 5, 2009, notice of intent reads:

Please find a copy of Dr. Eyman's report. Dr. Eyman has recommended continuation of antidepressant medication and re-evaluation of medication, individual psychotherapy, and behavioral pain management.

Wherefore, this is a continuing demand for TTD benefits and authorization of said treatment per Dr. Eyman's report. The medical record attached is 4 pages.⁶

⁴ P.H. Trans. at 13.

⁵ K.S.A. 44-534a(a)(1).

⁶ Claimant's Notice of Intent (filed Aug. 12, 2009).

Accordingly, claimant's notice of intent indicated the subject of the preliminary hearing was the medical treatment recommended by Dr. Eyman. At the preliminary hearing, claimant's attorney clarified his request. In closing statements, claimant's attorney stated he was only requesting a doctor to monitor claimant's medications and that doctor was Dr. Sankoorikal.⁷

During the preliminary hearing claimant offered claimant's exhibit 4, which included a medical report by Dr. Talal W. Khan. The medical report, which was addressed to claimant's attorney, addressed claimant's appointment with the doctor on April 9, 2009. The report also indicated it was dictated and transcribed that same date. Respondent asserted that Dr. Khan's report should be excluded from the record as it was not provided to respondent's counsel within 15 days of the examination and, consequently, respondent did not have an opportunity to have Dr. Jackson comment upon Dr. Khan's treatment recommendations.

Mr. McCurdy: I have no objection to 1, 2, or 3. I object to Exhibit No. 4. It wasn't provided to counsel within 15 days [of] the date of the independent medical examination. Because of that we haven't had the opportunity to have Doctor Jackson comment upon the recommendations made by Doctor Khan. Sorry, about that, I'm going to *[sic]* fast. We haven't had Doctor Jackson comment upon the recommendations made from Doctor Khan.

Judge Avery: Well didn't you just hand this to Mr. Brumley?

Mr. McCurdy: I did. I discovered it from KU. The statute requires that it be provided by -- within 15 days and we haven't had the opportunity to have Doctor Jackson comment on it.⁸

Judge Avery overruled the objection.

Dr. Khan's medical report again became a topic during closing arguments when the Judge asked about the treatment that had been recommended by Dr. Khan.

Judge Avery: What about the treatment Doctor Khan suggested? The injections and physical therapy and so forth?

Mr. Brumley: It's true that we may be back here for that another day.

Judge Avery: Well --

⁷ P.H. Trans. at 31.

⁸ *Id.*, at 8, 9.

Mr. McCurdy: There was never a notice of intent asking for the authorization of Doctor Khan's medical treatment.

Mr. Brumley: That's what I specifically argued today.

Mr. McCurdy: His medical report was not attached to any sort of application for preliminary hearing. I suppose if we want to have Doctor Jackson comment on that, but my concern is twofold. One is respondent losing the right to direct medical treatments, which I don't think we've done anything to lose that right.

The second concern is authorizing a physician to provide pain medication when there's no recommendation for pain medication and the records from Doctor Tague reflect a concern even before this injury of the claimant's long term chronic narcotic use.⁹

Accordingly, claimant's attorney acknowledged he had not requested the medical treatment proposed by Dr. Khan and that such treatment might be the subject of a future hearing.

1. Does the Board have jurisdiction to review whether the Judge either exceeded his jurisdiction or denied respondent due process by conducting the September 8, 2009, preliminary hearing, considering Dr. Khan's medical report, or designating the treating physician?

The Board's jurisdiction to review preliminary hearing orders originates from two statutes. The first, K.S.A. 44-534a, provides the Board has the authority to review certain preliminary hearing findings; namely, (1) whether the worker sustained an accidental injury; (2) whether the injury arose out of and in the course of employment; (3) whether there was timely notice and timely written claim; and (4) any other findings going to the compensability of the claim.¹⁰ The second statute, K.S.A. 2008 Supp. 44-551, grants the Board jurisdiction to review preliminary hearing orders when the Judge has exceeded his or her jurisdiction or authority.

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.¹¹

⁹ *Id.*, at 32-34.

¹⁰ K.S.A. 44-534a(a)(2).

¹¹ K.S.A. 2008 Supp. 44-551(i)(2)(A).

The undersigned finds that K.S.A. 2008 Supp. 44-551 grants the Board jurisdiction to review respondent's allegations that Judge Avery exceeded his jurisdiction.

Respondent, however, also alleges the Judge denied respondent due process by (1) conducting the September 8, 2009, preliminary hearing, (2) considering Dr. Khan's medical report, and (3) designating the treating physician. But respondent did not raise those due process issues to the Judge and K.S.A. 2008 Supp. 44-555c(a) limits the Board's review to those questions and issues presented to the administrative law judge. K.S.A. 2008 Supp. 44-555c(a) provides, in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Consequently, the undersigned need not address respondent's allegations that it has been denied due process as those issues were not raised to the Judge and it is improper to address them for the first time on appeal.

2. Did the Judge exceed his jurisdiction by either conducting the September 8, 2009, preliminary hearing or considering Dr. Talal Khan's medical report when that report was not attached to claimant's application for preliminary hearing?

The transcript from the September 8, 2009, preliminary hearing does not reflect that respondent objected to the hearing. Accordingly, that issue will not be considered for the first time on this appeal.

Regarding Dr. Khan's medical report, the Judge did not exceed his jurisdiction by considering the medical report of Dr. Khan. The parties do not dispute that Dr. Khan's medical report was omitted from claimant's application for preliminary hearing. Further, the parties do not dispute that K.S.A. 44-534a requires copies of medical reports and other evidence which a party intends to introduce as exhibits at the preliminary hearing *shall* be included with the application for preliminary hearing. The statute, however, does not specify the penalty for failing to comply.

K.A.R. 51-3-5a addresses preliminary hearings and states that medical records shall be considered by the administrative law judge at the preliminary hearing. The undersigned is unaware of any regulation that addresses the status of an exhibit when it was not attached to the application for preliminary hearing.

In *Bergstrom*¹² the Kansas Supreme Court interpreted the Workers Compensation Act and ruled that it was not proper to speculate on what the law should or should not be but, instead, the courts should follow the express language of the Act's statutes.

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.¹³

The parties have not cited (and the undersigned is unaware of) any appellate court decisions that have addressed the admissibility issue that respondent now raises.

In short, the question is not whether the Judge ruled rightly or wrongly on the issue of whether Dr. Khan's report should be admitted into the record for preliminary hearing purposes. Instead, the question is whether the Judge exceeded his authority by admitting the medical report. In that regard, administrative law judges are empowered to address evidentiary issues at preliminary hearings and, accordingly, Judge Avery did not exceed his jurisdiction and authority admitting and considering the report.

3. Did the Judge exceed his jurisdiction by designating Dr. Khan as the authorized treating physician rather than permitting respondent to provide claimant a list of three doctors from which to select a treating physician?

Respondent contends Judge Avery erred by appointing Dr. Khan as claimant's treating physician rather than permitting respondent to retain control over claimant's medical treatment. Respondent contends claimant was requesting a change of treating physician and, therefore, the issue is controlled by K.S.A. 2008 Supp. 44-510h(b)(1), which reads:

If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain

¹² *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

¹³ *Id.*, Syl. ¶ 1.

satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

The above statute addresses those situations where an injured worker is receiving medical treatment but believes that medical treatment is unsatisfactory. In the present proceeding claimant was receiving treatment for his psychological condition but he was not receiving treatment for his physical injury as he had been released from treatment in early 2009 by Dr. Adrian P. Jackson. At the time of the September 8, 2009, preliminary hearing, claimant did not have a doctor that was treating his physical injury and respondent knew that.

This Board has consistently held that when medical treatment is not being provided, the above-quoted statute dealing with the *change* of a physician is not applicable. Accordingly, K.S.A. 2008 Supp. 44-510h(b)(1) is not controlling. The undersigned finds and concludes the Judge did not exceed his jurisdiction by appointing Dr. Khan as the authorized treating physician.

In conclusion, the Judge did not exceed his jurisdiction and authority and this appeal should be dismissed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member dismisses this appeal.

IT IS SO ORDERED.

Dated this ____ day of November, 2009.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

¹⁴ K.S.A. 44-534a.

c: Bruce Alan Brumley, Attorney for Claimant
 Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
 Brad E. Avery, Administrative Law Judge